IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1381

EGAN OLDENDORF,

Petitioner,

versus

BENITO LOPEZ, INTERNATIONAL TERMINAL OPERATING CO., INC., and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Respondents.

BRIEF OF RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

As set forth in the as yet unreported opinion of the Court of Appeals:

> "On October 21, 1968, International Terminal Operating Co. Inc. (ITO, a stevedoring company, and Hoffman Rigging & Crane Service, Inc. (Hoffman), the owner and operator of a shoreside crane hired by ITO, were engaged in unloading a cargo of steel beams from the M/V Jobst Oldendorf, a vessel owned by Egan Oldendorf. The vessel was tied up with her port-

side inshore and her starboard side offshore. Prior to the arrival of the longshoremen, the ship's personnel removed the lashings and chocks which had secured the stow. The Hoffman crane, operated by Leo Hogan, was driven onto the pier alongside the hatch of the vessel and received instructions from an ITO signalman.

The accident which occasioned this litigation occurred with the removal of the first draft. The plaintiff Benito Lopez and three other longshoremen secured the first draft with chains and attached them to the cargo hook of the crane. The ITO signalman then instructed Hogan merely to hoist the hook with the cargo attached. Instead, Hogan raised the boom of the crane, causing the draft to drag from the offshore side over to the inshore side. The draft struck and dislodged a beam which fell over and onto Lopez's leg.

Lopez brought suit in the United States District Court for the Southern District of New York, Hon. Inzer B. Wyatt, District Judge, against Oldendorf, alleging both unseaworthiness of the vessel as well as negligence. Oldendorf impleaded ITO, Lopez's employer, and Hoffman, seeking indemnity from both. Hoffman and ITO cross-claimed against each other, seeking both indemnity and contribution. During the trial, Lopez was permitted to amend his complaint to sue Hoffman directly for negligence. The action by Lopez against Oldendorf was tried to a jury. All claims among Oldendorf, ITO and Hoffman, as well as Lopez's action against Hoffman, were tried to the Court. Counsel for all parties participated in the jury trial of the Lopez action against Oldendorf.

In the jury trial, a special verdict was returned on February 10, 1976, which provided: a) Lopez failed to establish his claim of unseaworthiness against Oldendorf, b) Lopez did establish his claim of negligence against Oldendorf, c) Lopez's total damages amounted to $365,000, and d) Lopez was 15% contributorily negligent. Because of the last finding, Lopez's recovery was reduced to $310,250."

Thereafter judgment was entered in the District Court in favor of Oldendorf against ITO in the amount of 50% if Oldendorf paid plaintiff's judgment; and in favor of Hoffman against ITO in the amount of 50% in the event Hoffman paid plaintiff's judgment. In its appeal to the Court of Appeals ITO argued, among other things, that since Oldendorf was liable for its own negligence and not for unseaworthiness it could not, under the circumstances, recover indemnity from ITO; and that under controlling law neither Oldendorf nor Hoffman could recover contribution from ITO as the District Court had permitted. The Court of Appeals held in favor of ITO on these two points and it is from that determination that Oldendorf seemingly seeks a review.

It is to be noted that the first of the questions presented in the petition for a writ is inaccurate as the legal issues on which the Court of Appeals decided the case were in fact raised, briefed and argued. The second of the questions presented in Oldendorf's petition is not only not argued or discussed anywhere in the petition, but would seem to relate solely to the recovery by Lopez against Oldendorf (as that was the only part of the case tried to a jury) and is therefore not something involving this respondent.

POINT I

The basic issue raised by the petition has been moot for the past four years and is of limited application at present to a dwindling number of old lawsuits.

Respondent submits that the basic issue here is the interplay between a shipowner's warranty of seaworthiness, the stevedore's warranty of workmanlike service set forth by this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) and refined in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964), and the immunity to a claim for contribution of a stevedore employer under the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C. 905 as articulated in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and recently reaffirmed in *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). However, issues relating to a vessel owner's liability for seaworthiness, and its right to obtain either indemnity or contribution from a stevedore employer have all been academic since November 27, 1972, the effective date of the 1972 Amendment to the aforesaid *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C. §905(b). For, as that statute indicates, as of November 27, 1972 the vessel owner no longer has a liability to a longshoreman based upon a warranty of seaworthiness, and the stevedore employer was removed of any liability whatsoever to the vessel owner, either directly or indirectly, and any agreements or warranties to the contrary were voided.

Accordingly, the tri-partite personal injury litigation involving longshoremen, shipowners, and stevedores which at one time flooded the Federal Courts has not existed since November 27, 1972. The case at bar is one of a

dwindling number of lawsuits of much older vintage. The issues thus presented by the case at bar are of extremely limited application and will in time become completely academic as the few remaining pre-Amendment cases are concluded.

In dealing with this same amendment this Court stated in Footnote 6 of its decision in *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974):

> "The intent and effect of this amendment were to overrule this Court's decisions in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer. See H.R. Rep. No. 92-1441, pp. 4-8 (1972); S. Rep. No. 92-1125, pp. 8-12 (1972)."

One of the consequences of such amendment was set forth as follows in *Rodriguez* v. *Olaf Pedersen's Rederi A/S*, 527 F.2d 1282, 1287 (2 Cir. 1975):

> "Congress has responded to the need. In 1972, it substantially revised the allocation of liability for accidents of this sort. 33 U.S.C. §905(b). The new statutory scheme deals with these problems in a comprehensive way that would be impossible for a court. *Since future cases will be governed by the statute, the reexamination of the settled law of this circuit which the stevedore invites us to make would have only the most limited practical effect.*" (Italics added)

POINT II

The Court of Appeals acted in accordance with well settled principles of law.

The judgment awarding both Oldendorf and Hoffman a 50% contribution from ITO was reversed by the Court of Appeals under well-settled law prohibiting such a claim. (It should be noted parenthetically that although Hoffman has filed its own petition for a Writ of Certiorari, it does not seek review of this action by the Court of Appeals).

The keystone decision holding that there is no right of contribution from a maritime employer who has paid compensation benefits to an injured longshoreman pursuant to the Longshoremen's and Harbor Workers' Compensation Act, *supra,* is *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 72 S. Ct. 277 (1952). That principle was reaffirmed by this Court in *Pope & Talbot Inc.* v. *Hawn,* 346 U.S. 406, 74 S. Ct. 202 (1953) wherein it was held that to subject such a compensation paying employer to contribution would frustrate the purpose of the Act.

And, when the issue was last before this Court in *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke, Inc.,* 417 U.S. 106, 94 S. Ct. 2174 (1974) this Court found that the factors underlying the decision in *Halcyon* still had force and vitality.

No point would be served in setting forth at length hereat all the many lower Court decisions that have adhered to these cases. However, it would certainly be strange for this Court to review its prior decisions at this date when the principles involved therein have been academic for more than 4 years by reason of the aforesaid 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, *supra.*

In finding that the District Court had improperly styled Oldendorf's 50% contribution as an "indemnity",

the Court of Appeals was correct since indemnity is defined as a full recovery over, *Hurdich* v. *Eastmount Shipping Corp.,* 305 F. 2d 397, 403 (2 Cir. 1974). Since the District Court had thus denied indemnity, the Court of Appeals was entirely correct in following such finding because its review of the case indicated that Oldendorf was the party "best situated to adopt preventive measures and thereby reduce the likelihood of injury." That is, indeed, the very test prescribed by this Court in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964). And, see *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.,* 508 F. 2d 437 (2 Cir. 1974), cert. den. sub nom. *Cia de Nav. Mar. Netumar* v. *Conceicao,* 421 U.S. 949, 95 S. Ct. 1680 (1975). Here, too, it would seem to be pointless for this Court to review established principles of law more than 4 years after the kind of litigation that gave birth to those principles has been abolished by Act of Congress.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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